Baker v The Queen
(2004) 210 ALR 1

Both *Baker v The Queen* [2004] HCA 45 and *Fardon v Attorney-General (Queensland)* [2004] HCA 46 involved unsuccessful attempts to use the *Kable* decision as a basis for the invalidation of State legislation. Both attempts failed. *Baker* was argued in the High Court on 4 February 2004, *Fardon* on 2 March 2004. The two cases were decided together on 1 October 2004.

At issue in *Baker* was a 1997 amendment to s 13A of the *Sentencing Act* 1989 (NSW). In November 1973, Mrs Virginia Morse was abducted from her home near Collarenebri, in north-western New South Wales. She was taken, gagged and blindfolded, across the State border to Queensland, where she was tortured, raped and eventually shot. Convicted of this atrocity, Allan Baker and Kevin Crump were sentenced in 1974 to life imprisonment. The trial judge told them: "I believe you should spend the rest of your lives in jail and there you should die. If ever there was a case where life imprisonment means what it says … this is it."

Under s 13A of the *Sentencing Act*, a person who had completed at least eight years of a sentence of life imprisonment could apply to the Supreme Court for a determination of sentence (effectively involving the fixing of a minimum sentence, after which parole might be possible). On 24 April 1997, an application made by Crump was successful: his minimum non-parole sentence was set to expire in 2003. (However, in 2001, a new s 154A inserted into the *Crimes (Administration of Sentences) Act* 1999 (NSW) imposed extraordinarily rigorous criteria for the parole of "a serious offender the subject of a non-release recommendation", including a need for the Parole Board to be satisfied that the offender "is in imminent danger of dying, or is incapacitated to the extent that he or she no longer has the physical ability to do harm to any person".)

A more immediate result of the 1997 determination in Crump's case was that s 13A of the *Sentencing Act* was amended so that "a person who is the subject of a non-release recommendation" was required to complete 20 years' imprisonment (rather than eight years) before making an application. Sub-section (1) defined a "non-release recommendation" as "a recommendation or observation, or an expression of opinion, by the original sentencing court that (or to the effect that) the person should never be released from imprisonment". In addition, a new sub-s (3A) declared that such a person "is not eligible" for a fresh determination "unless the Supreme Court … is satisfied that special reasons exist that justify making the determination". When Baker applied for a determination under this new regime, the judge found that there were no "special reasons" and the application was refused.

Baker invoked the *Kable* principle on two main grounds. First, the fact that the amendments related only to those "the subject of a non-release recommendation" was said to be excessively selective. Secondly, it was said that since the requirement of "special reasons" could have no possible content or meaning, its effect was to involve the Supreme Court in a "charade", masking the reality of a legislative judgment that those affected were never to be released.

The selectivity argument rested partly on the fact that the practice of sentencing judges in making or not making non-release recommendations had varied widely (so that the absence of such a recommendation was not necessarily an indication of a less shocking offence); partly on the fact that the persons subject to such recommendations in New South Wales in 1997 were a limited and identifiable class; and partly on the fact that the persons affected had been identified by name, in the course of the parliamentary debate on the 1997 amendment, in a way that appeared to suggest that the amendment was specifically intended for them:

New South Wales, *Parliamentary Debates*
Legislative Assembly, 8 May 1997

Mr Paul Whelan (Ashfield, Minister for Police): [8337] Allan Baker, Kevin Crump, Michael Murphy, Leslie Murphy, Gary Murphy, John Travers, Michael Murdoch, Stephen Jamieson, Matthew Elliot, Bronson Blessington – these animals represent pure evil. These animals deserve never to see the exit sign at the prison gate. These animals are reviled and shunned by anyone who has ever heard of their heinous crimes. There is not a person in our community who does not need protection from these animals and the security of knowing they will never again be free.

The decision of the Supreme Court in redetermining Kevin Garry Crump's life sentence has caused grave concern in the community. Crump and Baker committed one of the most revolting crimes this nation has ever seen. Put simply, they deserve to die in gaol …

The Kable experience has shown this Parliament the invalidity of individual-specific legislation. For this Parliament to introduce and consider Crump-specific legislation, in light of the Kable case, would not only be irresponsible but cruel and unusual punishment for the victims of his crimes. It would be a bill which would be likely to be struck down by the High Court. It would be a bill which would unfairly and unrealistically raise the expectation of the public and victims like Brian Morse. This Government will not inflict more pain, more heartache nor will it raise false hopes …

Proposing legislation that is constitutionally sound is the Government's primary objective so as not to give Crump and these nine other animals any hope for the future. The public expects nothing less. It expects real change not insane responses that will not work. In relation to this class of offenders the Government has responded by introducing this bill. This bill is effectively the toughest sentencing legislation ever introduced into this Parliament. It will provide the bleakest possible futures for these men – amongst the most dangerous in custody in this State …

[8338] [T]he bill tells judges that we, the Parliament and the community, do not expect these most serious offenders ever to be released.

Baker's constitutional challenge was unsuccessful. Kirby J was the only dissenter.

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Gleeson CJ: [5] When the 1997 amendments to s 13A, the subject of the present constitutional challenge, were made, there was a limited number of prisoners serving life sentences who had been the subject of non-release recommendations. Their identities, and the circumstances of their crimes, were widely known. The New South Wales Parliament decided that, in the scheme of s 13A, they should be treated as exceptional cases. It made special, and different, provision for them. As a matter of legislative power, the Parliament was entitled to do so. Senior counsel for the appellant acknowledged … that, if Parliament had simply named the persons in question and excluded them from the operation of s 13A, then his *Kable* argument would not have arisen. It might be argued, as a matter of legislative policy, that it was unreasonable of Parliament to single out for special, and disadvantageous, treatment those prisoners who had been sentenced by judges who were willing to make non-release recommendations when others who had also committed heinous crimes might have escaped such recommendations because of the inclinations of a particular sentencing judge. As a matter of policy, I see the force of that argument, but its significance in terms of legislative power is another matter. Parliament may have taken the view that at least those people in the position of the appellant should be subject to a special regime, and if others whose crimes were just as serious were given the benefit of more favourable treatment then that would have to be accepted. It is evident from the parliamentary material referred to in argument that the view was taken that public opinion demanded some form of legislative recognition of the fact that, included amongst prisoners serving life sentences, there were people whose crimes were so extreme that sentencing judges had been moved to recommend that they should never be released. As a matter of legislative power, it was open to the New South Wales Parliament to enact legislation reflecting such opinion. The distinction drawn by the legislature was not arbitrary. If, for any reason, one wanted to identify prisoners who had committed the most heinous crimes, searching for those who had been the subject of a non-release recommendation would be at least a good start. In the view of **[6]** some people, it would be unreasonable to stop there, and unfair to

discriminate solely on that ground. Choices of that kind, however, are generally within legislative competence.

Persons who were the subject of a non-release recommendation had one thing in common: the legislature knew that the judges who sentenced them thought that their crimes were so serious that, in their cases, imprisonment for life should mean exactly that. There may have been other cases where sentencing judges held the same opinion, but did not express it. Even so, the fact that a particular judge expressed such an opinion is, as a matter of fact, indicative of the gravity of the conduct of an offender. It was within the power of the Parliament to select such an expression of opinion as an indication that the offending was of the most serious kind. The Parliament was entitled to create a special regime for the most serious offenders, and to select as the criterion for distinguishing the most serious offenders the making of a non-release recommendation. The selection was not arbitrary, and the criterion was not irrelevant. If it was unfair, its unfairness could have been thought to lie in the consequence that some other offenders of a most serious kind received more favourable treatment.

There is a further consideration that Parliament is entitled to take into account when legislating about crime and punishment. Parliament is not functioning in a hermetically sealed environment. The public are aware that there are some prisoners whose crimes have attracted judicial condemnation of the utmost severity, and that such condemnation, at least in the past, has sometimes taken the form of an expression of opinion that a particular prisoner should remain in custody for life. The complex legal and political issues that surrounded the 1989 "truth-in-sentencing" legislation in New South Wales resulted from a notorious difference between the appearance and the reality of some sentences. When Parliament decided to permit prisoners who had been sentenced for "life" to apply for determinate sentences, which to the public would almost certainly appear to be lower than their original sentences, it was foreseeable that it would want to address, and perhaps reserve for special treatment, the most extreme cases, however those cases were to be identified.

McHugh, Gummow, Hayne and Heydon JJ gave a joint judgment in which they, too, rejected the argument. Insofar as it rested simply on the limited number and known identity of the persons affected, these judges held that the argument was defeated by earlier dicta, initially in *Leeth v Commonwealth* (1992) 174 CLR 455 and then in *Nicholas v The Queen* (1998) 193 CLR 17, by which members of the Court had distinguished the decision in *Liyanage v The Queen* [1967] 1 AC 259. The impugned legislation in *Liyanage* had been characterised as "**[290]** a special direction to the judiciary as to the trial of particular prisoners who were identifiable ... [as part of] a legislative plan ex post facto to secure the conviction and enhance the punishment of those particular individuals" (see Chapter 29, §3(a)). In *Leeth*, however, Mason CJ, Dawson and McHugh JJ had distinguished *Liyanage* by drawing a contrast between, on the one hand, legislation which "**[470]** prejudges an issue with respect to a particular individual … [and on the other hand] a law of general application which seeks in some respect to govern the exercise of a jurisdiction which it confers". In *Nicholas*, s 15X of the *Crimes Act* 1914 (Cth) was held to fall into the latter class.

Section 15X was introduced in 1996 to overcome the effect of the decision in *Ridgeway v The Queen* (1995) 184 CLR 19 (see Chapter 29, §3(b)). It provided that when a court is determining the admissibility of evidence in a prosecution for drug importation, the fact that the evidence was obtained unlawfully "is to be disregarded". At the time when s 15X came into force, the enforcement tactics concerned had been used in a finite number of cases, and the identity of those against whom charges had been laid was known. (The High Court was told that there were "half a dozen [cases] in New South Wales and Victoria".)

Despite this, the fact that s 15X applied not only to the pending prosecutions, but also to any future prosecutions in similar circumstances, was sufficient to save it. As Toohey J put it in *Nicholas*: "**[203]** There is nothing in the relevant provisions which singles out an individual, as in *Kable v Director of Public Prosecutions (NSW)*, or which singles out a particular category of persons. It is simply the fact that by applying to controlled operations commenced before [a specified date], s 15X necessarily operates only by reference to accused persons to whom those operations related. In the same way, it might be said that the *War Crimes Act 1945* (Cth) [considered in *Polyukhovich v Commonwealth*] necessarily

applied only to the conduct of a limited number of persons. But that did not lead to any declaration of invalidity."

In *Baker*, the joint judgment took a similar view. Since "**[16]** it could not be said that the appellant was the sole and direct 'target' of the 1997 Act", their Honours thought it "unnecessary to determine what would have been the consequences of such a conclusion".

Insofar as the argument rested on a notion of "discrimination", the joint judgment pointed out that while such a notion is relevant in cases under s 92 or s 117 of the Constitution, this was not such a case; and any attempt to invoke some wider constitutional implication of equality "**[15]** would have to overcome" the majority reasoning in *Leeth* (see Chapter 29, §4). Insofar as it rested on an assumption that the making of a non-release recommendation was not itself an exercise of judicial power, they answered that while it is true that, in the process of "trial and conviction on indictment", the exercise of judicial power is "**[16]** ordinarily … exhausted by a finding of guilt or acceptance of a plea of guilty followed by sentence", nevertheless the making of judicial recommendations for or against clemency had been sufficiently common in the history of criminal trials that they should be accepted "as one of the historical instances [of judicial power] identified in *R v Davison* [(1954) 90 CLR 353 at 369]". Callinan J also recalled the "**[46]** long history" of such recommendations, and added:

> **Callinan J: [47]** Even if … all of the appellant's submissions so far were correct, it is not entirely clear what legal consequences the appellant contends should follow. The purpose of reliance upon them seems to be to demonstrate how fragile, uncertain, arbitrary, discriminatory and therefore unfair and unreasonable, legislation that takes as a basis for its application, the making or otherwise of an unnecessary recommendation of the relevant kind, is, and also to provide a basis for a submission, that if the legislative criteria for penal servitude depart from what can be seen to be logical, equal, and general in application, and fair and reasonable in some objectively ascertainable sense, then a court which applies those criteria will not be exercising judicial power.

The other main issue in *Baker* turned on the supposed vacuity of "special reasons" as a criterion which judges were required to apply.

> **Gleeson CJ: [6]** The weight of the appellant's *Kable* argument was put upon the requirement of "special reasons" in s 13A(3A) … [T]hat requirement was said to be devoid of content, and illusory. On that premise, in its application to people the subject of non-release recommendations, s 13A involved the Supreme Court in a charade. The legislature was using the forms of judicial procedure to mask the reality of the legislative decree, which was that these people were never to be released. On that premise, as a matter of principle, the case would be very close to *Kable*. It is the premise that is in contest …
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> **[7]** There is nothing unusual about legislation that requires courts to find "special reasons" or "special circumstances" as a condition of the exercise of a power. This is a verbal formula that is commonly used where it is intended that judicial discretion should not be confined by precise definition, or where the circumstances of potential relevance are so various as to defy precise definition. That which makes reasons or circumstances special in a particular case might flow from their weight as well as their quality, and from a combination of factors.
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> It is the duty of a court to give meaning to the requirement of "special reasons" in sub-s (3A) unless that is impossible. That elementary principle of statutory interpretation cannot be ignored. Section 31 of the *Interpretation Act 1987* (NSW) provides that an Act shall be construed so as not to exceed legislative power … As Bowen LJ said in *Curtis v Stovin* [(1889) 22 QBD 513 at 517], "if it is possible, the words of a statute must be construed so as to give a sensible meaning to them".

Once sub-s (3A) was approached in that spirit, it followed that what Mr Whelan had said in the Legislative Assembly debate ought not to be regarded as relevant:

> **Gleeson CJ: [7]** It is inappropriate and impermissible to use speeches made in Parliament to seek to evade the statutory command in s 31 of the *Interpretation Act*, or fundamental principles of statutory interpretation. The use that can be made of such extrinsic material is governed by s 34 of the *Interpretation Act*. Where a dispute about the meaning of a statutory provision … arises the Court is

not entitled to treat what was said by a member of Parliament in the course of political debate as some kind of evidence of legislative bad faith. The duty of the Court, reinforced by the *Interpretation Act* …, is to give meaning to the whole of s 13A unless it is impossible to do so.

The only issue of statutory interpretation … is whether the expression "special reasons" is devoid of content, so that it is impossible for any case to satisfy the requirement. It is not to be overlooked that, now that the appellant is left only with his *Kable* argument, it suits his purposes to contend that he can never make out a case of "special reasons". That was not his primary argument in the Supreme Court, where his counsel was strongly contending that the requirements of sub-s (3A) could be, and were, satisfied …

[8] The structure of s 13A is to distinguish between ordinary cases for the application of the section and a special class of case, being the cases referred to in sub-ss (3)(b) and (3A). In the special cases, it is necessary for there to be "special reasons" to justify the making of a determination … In the ordinary case, the Supreme Court is directed by sub-s (9) to have regard to all relevant matters. Its attention is also directed specifically to certain matters. It would be absurd to construe "special reasons" in sub-s (3A) as excluding from consideration any matter covered by sub-s (9), because sub-s (9) covers all relevant matters. That would leave for consideration only irrelevant matters. The legislation does not require such a construction, and the principles of statutory interpretation referred to earlier argue strongly against it. Questions of weight and degree may arise. To take one specific example, sub-s (9) directs attention to the age of an offender at the time of the commission of the offence as a relevant matter in the ordinary case. In a particular case, the offender may have been a juvenile at the time of the offence. (This example, it should be added, is not purely hypothetical. One of the persons the subject of a non-release recommendation was 14 at the time of the offence.) It would be open to a judge to treat that as a special reason for the purposes of sub-s (3A). By reason of sub-s (9), age is always relevant, although in some cases its significance may be small. In a particular case, it may have a special significance. It would not necessarily be conclusive, but it would be open for consideration. To take another example, mentioned in the Court of Criminal Appeal, assistance given to the authorities in the detection of crime, sometimes involving extreme danger, could be a relevant matter in the ordinary case. There may also be particular circumstances in which, either [alone] or in combination with other factors, it could amount to a special reason in one of the special cases.

Examples of this kind cannot be dismissed as fanciful. We are not dealing with an argument that it is difficult to satisfy the requirements of sub-s (3A). We are dealing with an argument that it is impossible to satisfy the requirements because the statutory phrase "special reasons" is, in this context, devoid of content. We are dealing with a legal argument aimed at demonstrating invalidity, not a political argument aimed at demonstrating the desirability of legislative amendment.

The appellant's submission, that it will always be impossible to establish "special reasons" under sub-s (3A), was not simply a rhetorical overstatement of a complaint about unfairness. It was the basis for the contention that, in its application to persons the subject of non-release recommendations, the **[9]** legislative scheme was a charade, and the Supreme Court's judicial process was being used merely to implement a legislative intention that such persons would never be released. In order to make that argument good, it is not sufficient to show that it is difficult to establish special reasons, or that successful applications are likely to be rare. It is necessary to show that it is impossible to establish special reasons, and that no application could succeed. That has not been shown.

McHugh, Gummow, Hayne and Heydon JJ: [14] Counsel for the appellant accepted that his argument depended upon the proposition that the qualification to s 13A(3A), requiring the Supreme Court to be satisfied that "special reasons" exist that justify making the determination, was a criterion devoid of meaning. Because the qualification was devoid of meaning, it followed, so the appellant's argument proceeded, that the Supreme Court would be engaged in "a charade" in seeking to identify the reasons said to be "special". All the matters that could constitute "special reasons" were matters that would necessarily be taken into account in the task of making a determination.

The premise for the appellant's argument is incorrect. The qualification to s 13A(3A) may be attended by difficult questions of construction. Whether or not that is so, it is a qualification to which meaning not only can, but must, be given in the context of the facts advanced in any particular case as warranting the description "special reasons". The fact that reasons identified as "special" may (indeed

almost certainly would) be relevant to the exercise of the power of determination does not strip the expression "special reasons" of meaning.

It is important, as Gaudron J stressed in *Sue v Hill* [(1999) 199 CLR 462 at 520-21], in construing such a broadly expressed conferral of authority that it is to be exercised by a court, not by an administrator. There are numerous authorities rejecting submissions that the conferral of powers and discretions for exercise by imprecisely expressed criteria [denies] the character of judicial power and involve[s] the exercise of authority by recourse to non-legal norms … [In] *R v Joske; Ex parte Shop Distributive and Allied Employees' Association* [(1976) 135 CLR 194 at 215-16], Mason and Murphy JJ observed:

> "[T]here are countless instances of judicial discretions with no specification of the criteria by reference to which they are to be exercised – nevertheless they have been accepted as involving the exercise of judicial power."

Callinan J: [48] In my opinion the appeal must fail. The appellant has not made out that the entertaining and determination of an application under s 13A of the Sentencing Act is not an exercise of judicial power. Legislative requirements that a judicial determination depend upon the demonstration of exceptional or special matters, events, circumstances, or reasons, are far from unique and have been the subject of much judicial deliberation. Regularly this Court is called upon to decide whether *special* leave to appeal should be granted. Speaking of the expression "exceptional circumstances" in s 2 of the *Crime (Sentences) Act 1997* (UK) required for a decision not to impose a sentence of life imprisonment, Lord Bingham of Cornhill CJ said in *R v Kelly (Edward)* [[2000] QB 198 at 208]:

> "We must construe 'exceptional' as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon. To be exceptional **[49]** a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered."

"Special reasons" in my opinion share those characteristics.

It is not necessary to catalogue the matters which could constitute special reasons within s 13A(3A) of the Sentencing Act. It may be that it is only in combination, or in increasing degrees of relevance and importance that circumstances may come to be, or provide special reasons. The fact that one or more of them may have been, or should have been taken into account in fixing the original sentence may not necessarily mean that some or other of those circumstances, whether [or not] they have in some way changed or evolved, may not come to constitute in the future, alone, or with others, "special reasons". Indeed, s 13A(4A) of the Sentencing Act, not surprisingly requires the Supreme Court to look back and to take into account the circumstances of the offence, and other offences of an applicant. Section 13A(10A) states other matters to which regard must be had. Neither sub-section, however, precludes consideration of other matters.

Everything is to depend upon all that is relevant and known to the Supreme Court at the time of the application. This may perhaps include such matters as improved prospects of rehabilitation, senility, disability, genuine contrition, an act or acts of heroism in prison, a reduced need for deterrence, the discovery of fresh facts, and a marked change in sentencing patterns, taken of course with the matters to which the Court is to have regard, the circumstances of the offence and other offences of the offender. I express no concluded view on these matters. The experience and wisdom of the law counsel reticence in any attempt to foresee the future, or to give in advance the complexion of special to what may, but has so far not occurred or come into contention.

The appellant's further submission, that everything that might ever conceivably be regarded as special is not in truth more than an ordinary sentencing consideration, that the search therefore for special reasons is a futility, and a search for a futility is not an exercise in which a court can genuinely judicially engage should similarly be rejected. There is real content, as I have just pointed out, in what the Supreme Court has to decide under s 13A(3A) of the Sentencing Act. In making such a decision the Court is not therefore embarking on a futility. In deciding the application in the present case the Court was undertaking an orthodox and conventional judicial exercise.

What followed from these conclusions was that the exercise of judicial power had not been impaired: even if the challenged provisions had been found in Commonwealth legislation, no

infringement of Chapter III would be involved. It followed that there was no possibility of invalidity at the State level and that the question of *Kable* incompatibility simply did not arise.

In the earlier case of *HA Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547, certain land at Morayfield, north of Brisbane, had been rezoned for a shopping centre. The plaintiff had unsuccessfully appealed to the Planning and Environment Court against the rezoning. A further appeal was pending in the Queensland Court of Appeal when the *Local Government (Morayfield Shopping Centre Zoning) Act* 1996 (Qld) was passed, giving legislative approval to the rezoning. In a joint unanimous judgment, a five-judge High Court (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ) held that no interference with the judicial process was involved. The enactment of planning legislation does not preclude the subsequent enactment of exceptions for particular cases; and the functions of a court under such legislation are not the kind of functions that "**[562]** appertain exclusively to the judicial power". The Court noted that: "**[561]** *Kable* took as a starting point the principles applicable to courts created by the Parliament under s 71 and to the exercise by **[562]** them of the judicial power of the Commonwealth under Ch III. If the law in question here had been a law of the Common-wealth and it would not have offended those principles, then an occasion for the application of *Kable* does not arise." That aspect of *Bachrach* was followed in *Silbert v Director of Public Prosecutions (WA)* (2004) 205 ALR 43, in relation to the *Crimes (Confiscation of Profits) Act 1988* (WA). It was followed again in *Baker*. The joint judgment quoted the relevant passage from *Bachrach* with approval, as indicating "**[9]** the appropriate approach in the present appeal":

> **McHugh, Gummow, Hayne and Heydon JJ: [9]** If the provisions of the 1997 Act under challenge had been laws of the Commonwealth, they would have complied with the principles found in Ch III of the Constitution for the exercise of federal jurisdiction by federal courts … **[10]** That being so, the appellant's attack on validity cannot succeed …
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> **[16]** The doctrine in *Kable* is expressed to be protective of the institutional integrity of the State courts as recipients and potential recipients of federal jurisdiction. If the State law in question confers jurisdiction of a nature which would meet the more stringent requirements for the exercise by the Supreme Court of judicial power under investment by federal law, there is no occasion to enter upon the question of whether the less stringent requirements of *Kable* are met. Counsel for the Attorney-General of the Commonwealth encapsulated the point in his submissions that, if a law satisfied the stricter tests required with respect to the judicial power of the Commonwealth, then the Court did not have to go on to ask whether it satisfied the lesser hurdle presented by the reasoning in *Kable*.

Notice that, while this passage denies the relevance of *Kable* in any case where the functions conferred on State courts would be acceptable for a federal court, it also envisages that, in any case where the *Kable* principle is relevant, it is sufficient that the State court involved is *potentially* a recipient of federal jurisdiction. A similar approach was taken in *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 206 ALR 315, where McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, contrary to what might have been thought (see Chapter 6, §4), held that the territories are also subject to the *Kable* principle. They accepted Gaudron J's statement in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 that, "**[363]** as courts created pursuant to s 122 of the Constitution may also be invested with the judicial power of the Commonwealth, it should now be recognised, consistently with the decision in *Kable*, that the Constitution also requires that those courts be constituted by persons who are impartial and who appear to be impartial."

In *Bachrach*, there had been a specific holding "**[561]** that the Queensland Supreme Court (including the Court of Appeal) is *not* a federal court created by the Parliament within the meaning of s 71 of the Constitution, and that the litigation pending in the Court of Appeal did *not* involve the exercise by it of federal jurisdiction" (emphasis added). It was for that very reason that the plaintiff's argument was perceived as depending on *Kable*. By contrast, Callinan J noted in *Baker* (at 43), apparently with approval, that Ipp AJA, in the New South

Wales Court of Criminal Appeal (*Baker* (2002) 130 A Crim R 417 at 430), had held that the *Baker* case itself involved federal jurisdiction for the reasons given by Toohey J in *Kable*: that is, that there might be "federal constitutional points" arising from s 80 of the Constitution, or from some possible implication analogous to that suggested in *Leeth*.

The principle emerging from *Bachrach*, *Silbert* and *Baker* – that *Kable* can have no application to a law which would not offend Chapter III if enacted at federal level – was not sufficient to resolve the issue in *Fardon v Attorney-General (Queensland)*, since there was no consensus on whether the challenged law would be valid if enacted at Commonwealth level. The law in question was the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld), which authorised "interim detention orders" (under s 8), and "supervision orders" or "continuing detention orders" (under s 13), to be made by the Supreme Court of Queensland in relation to a "prisoner". The word "prisoner" was defined for this purpose by s 5(6) as meaning "a prisoner detained in custody who is serving a period of imprisonment for a serious sexual offence, or serving a period of imprisonment that includes a term of imprisonment for a serious sexual offence, whether the person was sentenced to the term or period of imprisonment before or after the commencement of this section".

The appellant, Mr Robert Fardon, fell within this definition because, on 30 June 1989, he was sentenced to 14 years' imprisonment for rape, sodomy and assault. That sentence was due to expire on 30 June 2003; but the *Dangerous Offenders (Sexual Offenders) Act* came into force on 6 June, and an interim detention order was made against Fardon on 27 June. After further interim protection orders on 31 July and 2 October, a "continuing detention order" was made on 6 November 2003, authorising detention in custody "for an indefinite term for control, care and treatment". Under s 40 of the *Judiciary Act* 1903 (Cth) an appeal to the Queensland Court of Appeal was removed into the High Court, where an appeal against the first interim detention order was already pending.

Gummow J was inclined to think that a similar scheme enacted at Commonwealth level would *not* have been constitutional.

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Gummow J: [71] The submissions for the Attorney-General of the Commonwealth, who intervened in this Court, … should be considered first. The contention here is that s 13 of the Act … does not fall beyond the limit established by *Kable* because the Parliament of the Commonwealth itself could validly confer on a Ch III court the functions contained in s 13 …

The Commonwealth's submissions are to be rejected. Several steps are involved in reaching that conclusion. The first is by way of disclaimer. It may be accepted that, consistently with Ch III and with what was said by this Court in *Veen v The Queen [No 2]* [(1988) 164 CLR 465 at 476], the objectives of the sentencing process include the various and overlapping purposes of "protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform" …

Further, for the purposes of argument, it may be accepted that a propensity to commit serious offences in the future and the consequential need for protection of the public may, consistently with Ch III, support the imposition at trial of a sentence which fosters that protection by a measure of preventative detention of the offender.

That appears, in the different constitutional setting in Canada, to be the outcome of the decision … in *R v Lyons* [[1987] 2 SCR 309; (1987) 44 DLR(4th) 193]. The Supreme Court upheld the validity of Pt XXI of the Canadian Criminal Code (headed "PREVENTIVE DETENTION"); this provided that where a person had been adjudged guilty of a "serious personal injury offence", the court, on application, might find the offender to be a dangerous offender and thereupon impose a sentence of indeterminate detention in place of any other sentence that might have been imposed. However, La Forest J emphasised [[1987] 2 SCR at 328; 44 DLR(4th) at 213-14] that this punishment "flows from the actual commission of a specific crime, the requisite elements of **[72]** which have been proved to exist beyond a reasonable doubt" …

The continuing detention orders for which s 13 of the Act provides are not of the character identified in *Lyons* … It is true that the prisoner must still be under sentence when the Attorney-General moves under s 5 for an order and that [by virtue of s 50 of the Act] the effect of the continuing detention order … is the same as if the appellant had been, by warrant, committed into custody [under the *Corrective Services Act* 2000 (Qld)] … Nevertheless, that detention of the appellant does not draw its authority from what was done in the sentencing of the appellant by Kneipp J in 1989. The Solicitor-General, in oral submissions, correctly accepted that the Act took as the factum for its application the status or condition of the appellant as a "prisoner" within the meaning of s 5(6) …

It is accepted that the common law value expressed by the term "double jeopardy" applies not only to determination of guilt or innocence, but also to the quantification of punishment. However, the making of a continuing detention order with effect after expiry of the term for which the appellant was sentenced in 1989 did not punish him twice, or increase his punishment for the offences of which he had been convicted. The Act operated by reference to the appellant's status deriving from that conviction, but then set up its own normative structure …

[73] Upon the hypothesis propounded by the Commonwealth, the significant result of the foregoing is that a person may be held in detention in a corrective facility, to use the modern euphemism, by order of a court exercising federal jurisdiction and by reason of a finding of criminal propensity rather than an adjudication of criminal guilt. That invites attention to two related propositions.

The first is that expressed as follows by Gaudron J in *Re Nolan; Ex parte Young* [(1991) 172 CLR 460 at 497]:

> "[I]t is beyond dispute that the power to determine whether a person has engaged in conduct which is forbidden by law and, if so, to make a binding and enforceable declaration as to the consequences which the law imposes by reason of that conduct lies at the heart of exclusive judicial power."

The making by the Supreme Court of a continuing detention order under s 13 is conditioned upon a finding, not that the person has engaged in conduct which is forbidden by law, but that there is an unacceptable risk that the person will commit a serious sexual offence.

That directs attention to the second proposition and to what was said by Brennan, Deane and Dawson JJ in *Chu Kheng Lim v Minister for Immigration* [(1992) 176 CLR 1 at 27-28]. That litigation directly concerned the detention of aliens with no title to enter or remain in Australia, not the situation of citizens such as the appellant. However, their Honours earlier in their judgment [176 CLR at 27] had said that, putting aside the cases of detention on grounds of mental illness, infectious disease and … other "exceptional cases", there was a constitutional principle derived from Ch III that:

> "the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt".

That passage was applied as a step in the reasoning in *Kable* of Toohey J and Gummow J [189 CLR at 97-98, 131-32], and is reflected in that of Gaudron J and McHugh J [189 CLR at 106-07, 121-22].

It must be said that the expression of a constitutional principle in this form has certain indeterminacies. The first is the identification of the beneficiary of the principle as "a citizen". That may readily be understood given the context in *Lim* of the detention of aliens with no title to enter or remain in Australia and their liability to deportation processes. But in other respects aliens are not outlaws; many will have a statutory right or title to remain in Australia for a determinate or indeterminate period and at least for that period they have the protection afforded by the Constitution and the laws of Australia. There is no reason why the **[74]** constitutional principle stated above should not apply to them outside the particular area of immigration detention with which *Lim* was concerned. Subsequent references in these reasons to "a citizen" should be read in this extended sense.

Another indeterminacy concerns the phrase "criminal guilt". In *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* [(2003) 201 ALR 1 at 28-29], Hayne J, after referring to the unstable nature of a dichotomy between civil and criminal proceedings, went on:

> "It seeks to divide the litigious world into only two parts when, in truth, that world is more complex and varied than such a classification acknowledges. There are proceedings with both civil and criminal characteristics: for example, proceedings for a civil penalty under companies and trade practices legislation. The purposes of those proceedings include purposes of deterrence, and the consequences can be large and punishing."

However, what is involved here is the loss of liberty of the individual by reason of adjudication of a breach of the law. In such a situation, as Kirby J remarked in *Labrador* [201 ALR at 13], that loss of liberty is "ordinarily one of the hallmarks reserved to criminal proceedings conducted in the courts, with the protections and assurances that criminal proceedings provide".

I would prefer a formulation of the principle derived from Ch III in terms that, the "exceptional cases" aside, the involuntary detention of a citizen in custody by the State is permissible only as a consequential step in the adjudication of criminal guilt of that citizen for past acts. That central conception is consistent with the holding in *Polyukhovich v The Commonwealth* [(1991) 172 CLR 501] that the conduct may not have been forbidden by law when it was engaged in; the detention under federal legislation such as that upheld in *Polyukhovich* still follows from a trial for past, not anticipated, conduct.

That formulation also eschews the phrase "is penal or punitive in character". In doing so, the formulation emphasises that the concern is with the deprivation of liberty without adjudication of guilt rather than with the further question whether the deprivation is for a punitive purpose.

Further, "punishment" and cognate terms have an indeterminate reference, and are "heavily charged with subjective emotional and intellectual overtones" [Norval Morris in (1967) 13 *McGill Law Journal* 534 at 552]. The indeterminacy of the term "punishment" is illustrated by the division of opinion in the United States Supreme Court in *Kansas v Hendricks* [521 US 346 (1997)]. The Kansas law under challenge in that case established procedures for the commitment of those who by reason of a "mental abnormality" or a "personality disorder" were likely to engage in "predatory acts of sexual violence". The issues **[75]** (resolved in favour of validity) … were treated by the Supreme Court as turning on the classification of commitment under the law as "punishment". The majority contrasted detention for the purpose of protecting the community from harm and "the two primary objectives of criminal punishment: retribution and deterrence" [521 US at 361-62]. This Court has looked at the objectives of the sentencing process rather more broadly … [He referred again to *Veen v The Queen [No 2]*.]

Preventative detention regimes attached by legislation to the curial sentencing process upon conviction have a long history in common law countries. The *Habitual Criminals Act 1905* (NSW) and Pt II of the *Prevention of Crime Act 1908* (UK) are examples of such legislation. It may be accepted that the list of exceptions to which reference was made in *Lim* [176 CLR at 28] is not closed. But it is not suggested that regimes imposing upon the courts functions detached from the sentencing process form a new exceptional class, nor that the detention of the mentally ill for treatment is of the same character as the incarceration of those "likely to" commit certain classes of offence.

Another of the well-understood exceptions to which the Court referred in *Lim*, with a citation from Blackstone, was committal to custody, pursuant to executive warrant of accused persons to ensure availability to be dealt with by exercise of the judicial power. But detention by reason of apprehended conduct, even by judicial determination on a *quia timet* basis, is of a different character and is at odds with the central constitutional conception of detention as a consequence of judicial determination of engagement in past conduct.

It is not to the present point … that federal legislation … [might] provide for detention without adjudication of criminal guilt but by a judicial process of some refinement. The vice for a Ch III court and for the federal laws postulated … would be in the nature of the outcome, not the means by which it was obtained.

Hayne J: [103] Subject to one exception, I agree in the reasons of Gummow J. The exception is that I would reserve my opinion about whether federal legislation along the lines of the Act would be invalid. As Gummow J points out, no sharp line can be drawn between criminal and civil proceedings or between detention that is punitive and detention that is not. And once it is accepted, as it has been in Australia, that protection of the community from the consequences of an offender's re-offending is a legitimate purpose of sentencing, the line between preventative detention of those who have committed crimes in the past (for fear of what they may do in the future) and punishment of those persons for what they have done becomes increasingly difficult to discern. So too, when the propensity **[104]** to commit crimes (past or future) is explained by reference to constructs like "anti-social personality disorder" and it is suggested that the disorder, or the offender's behaviour, can be treated, the line between commitment for psychiatric illness and preventative detention is difficult to discern. Indeed, the premise for the decisions of the Supreme Court of the United States upholding State civil

commitment statutes is that the statutes do not differ in substance or effect from a legislative regime providing for the confinement of some who suffer psychiatric illness.

I acknowledge the evident force in the proposition that to confine a person for what he or she might do, rather than what he or she has done, is at odds with identifying the central constitutional conception of detention as a consequence of judicial determination of engagement in past conduct. Nonetheless, I would reserve for further consideration, in a case where it necessarily falls for decision, whether legislation requiring a federal court to determine whether a person previously found guilty of an offence should be detained beyond the expiration of the sentence imposed, on the ground that the prisoner will or may offend again, would purport to confer a non-judicial function on that court.

Kirby J, who was otherwise in dissent, agreed with Gummow J on this issue. Gleeson CJ found the issue "**[56]** unnecessary … to decide", and the other majority judges were silent. They did, however, emphasise the difference between the rigorous requirements under Chapter III for the exercise of federal judicial power, and the weaker requirements arising under *Kable* at the State level. Thus, while *Bachrach* and *Baker* hold that enactments which would be valid at federal level must necessarily be valid at State level, *Fardon* insists that a law which would be invalid if enacted at federal level may nevertheless be valid at State level.

McHugh J: [62] It is a serious constitutional mistake to think that either *Kable* or the Constitution assimilates State courts or their judges and officers with federal courts and their judges and officers. The Constitution provides for an integrated court system. But that does not mean that what federal courts cannot do, State courts cannot do. Australia is governed by a federal, not a unitary, system of government. [He quoted what was said in *Le Mesurier v Connor* [(1929) 42 CLR 481 at 495-96] …

The doctrine of the separation of powers, derived from Chs I, II and III of the Constitution, does not apply as such in any of the States, including Queensland. Chapter III of the Constitution, which provides for the exercise of federal judicial power, invalidates State legislation that purports to invest jurisdiction and powers in State courts only in very limited circumstances. One circumstance is State legislation that attempts to alter or interfere with the working of the federal judicial system set up by Ch III [*Commonwealth v Queensland (Queen of Queensland Case)* (1975) 134 CLR 298]. Another is the circumstance dealt with in *Kable*: legislation that purports to confer jurisdiction on State courts but compromises the institutional integrity of State courts and affects their capacity to exercise federal jurisdiction invested under Ch III **[63]** impartially and competently. Subject to that proviso, when the Federal Parliament invests State courts with federal jurisdiction, it must take them as it finds them.

Cases in this Court have often demonstrated that, subject to the *Kable* principle, the Parliament of the Commonwealth must take State courts as it finds them. Thus, the structure of a State court may provide for certain matters to be determined by a person other than a judge – such as a master or registrar – who is not a component part of the court. If the Parliament of the Commonwealth invests that court with federal jurisdiction in respect of those matters, the investiture does not contravene Ch III of the Constitution, and that person may exercise the judicial power of the Commonwealth [*Commonwealth v Hospital Contribution Fund* (1982) 150 CLR 49] …

Furthermore, when investing a State court with federal jurisdiction, the Federal Parliament cannot alter the structure of the court by making an officer of the Commonwealth a functionary of the court and empowering the officer to administer part of its jurisdiction. Nor can it invest State courts with federal jurisdiction and, contrary to the open justice rule, require those courts to conduct proceedings in closed court [*Russell v Russell* (1976) 134 CLR 495]. Nor can the Parliament require a State court invested with federal jurisdiction to have trial by jury when the court is so organised under State law that it does not use that form of trial when exercising State jurisdiction [*Brown v The Queen* (1986) 160 CLR 171 at 199]. For example, Magistrates' Courts in this country do not provide for trial by jury. If the Parliament, acting under s 77(iii) of the Constitution, enacted a law purporting to invest a Magistrates' Court of a State with jurisdiction to hear indictable offences and the law, expressly or impliedly, sought to require trial by jury in the Magistrates' Court, the law would be invalid because a law that invests a State court with federal jurisdiction must take the **[64]** court as it finds it. In any event, s 80 of the Constitution … would operate to invalidate the law.

Moreover, as Gaudron J pointed out in *Kable* [189 CLR at 106]:

> "[T]here is nothing to prevent the Parliaments of the States from conferring powers on their courts which are wholly non-judicial, so long as they are not repugnant to or inconsistent with the exercise by those courts of the judicial power of the Commonwealth."

Nor is there anything in the Constitution that would preclude the States from legislating so as to empower non-judicial tribunals to determine issues of criminal guilt or to sentence offenders for breaches of the law. The Queensland Parliament has power to make laws for "the peace welfare and good government" of that State. That power is preserved by s 107 of the Commonwealth Constitution. Those words give the Queensland Parliament a power as plenary as that of the Imperial Parliament. They would authorise the Queensland Parliament, if it wished, to abolish criminal juries and require breaches of the criminal law to be determined by non-judicial tribunals. The content of a State's legal system and the structure, organisation and jurisdiction of its courts are matters for each State. If a State legislates for a tribunal of accountants to hear and determine "white collar" crimes or for a tribunal of psychiatrists to hear and determine cases involving mental health issues, nothing in Ch III of the Constitution prevents the State from doing so. Likewise, nothing in Ch III prevents a State, if it wishes, from implementing an inquisitorial, rather than an adversarial, system of justice for State courts. The powers conferred on the Queensland Parliament by s 2 of the *Constitution Act 1867* (Q) are, of course, preserved subject to the Commonwealth Constitution. However, no process of legal or logical reasoning leads to the conclusion that, because the Federal Parliament may invest State courts with federal jurisdiction, the States cannot legislate for the determination of issues of criminal guilt or sentencing by non-judicial tribunals.

The bare fact that particular State legislation invests a State court with powers that are or jurisdiction that is repugnant to the traditional judicial process will seldom, if ever, compromise the institutional integrity of that court to the extent that it affects that court's capacity to exercise federal jurisdiction impartially and according to federal law. State legislation may alter the burden of proof and the rules of evidence and procedure in civil and criminal courts in ways that are repugnant to the traditional judicial process without compromising the institutional integrity of the courts that must administer that legislation. State legislation may require State courts to exercise powers and take away substantive rights on grounds that judges think are foolish, unwise or even patently unjust. Nevertheless, it does not follow that, because State legislation requires State courts to make orders that could not be countenanced in a society with a Bill of Rights, the institutional integrity of those courts is compromised.

The pejorative phrase – "repugnant to the judicial process" – is not the constitutional criterion. In this area of constitutional discourse, it is best avoided, for it invites error. That which judges regard as repugnant to the judicial process may be no more than a reflection of their personal dislike of legislation that they **[65]** think unjustifiably affects long recognised rights, freedoms and judicial procedures. State legislation that requires State courts to act in ways inconsistent with the traditional judicial process will be invalid only when it leads to the conclusion that reasonable persons might think that the legislation compromises the capacity of State courts to administer invested federal jurisdiction impartially according to federal law. That conclusion is likely to be reached only when other provisions of the legislation or the surrounding circumstances *as well as* the departure from the traditional judicial process indicate that the State court might not be an impartial tribunal that is independent of the legislative and the executive arms of government.

Callinan and Heydon JJ: [110] This Court did not in *Kable* hold … that in all respects, a Supreme Court of a State was the same, and subject to the same constraints, as a federal court established under Ch III of the Constitution. Federal judicial power is not identical with State judicial power. Although the test, whether, if the State enactment were a federal enactment, it would infringe Ch III of the Constitution, is a useful one, it is not the exclusive test of validity. It is possible that a State legislative conferral of power which, if it were federal legislation, would infringe Ch III of the Constitution, may nonetheless be valid. Not everything by way of decision-making denied to a federal judge is denied to a judge of a State. So long as the State court, in applying legislation, is not called upon to act and decide, effectively as the alter ego of the legislature or the executive, so long as it is to undertake a genuine adjudicative process and so long as its integrity and independence as a court are not compromised, then the legislation in question will not infringe Ch III of the Constitution.

In this instance, the six majority judges had no doubt that the detention procedures established by the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) were valid.

Gleeson CJ: [52] The constitutional objection to the legislative scheme is not based, or at least is not directly based, upon a suggested infringement of the appellant's human rights. The objection is based upon the involvement of the Supreme Court of Queensland in the process. It is the effect of the legislation upon the institutional integrity of the Supreme Court, rather than its effect upon the personal liberty of the appellant, that is said to conflict with the requirements of the Constitution. There is a paradox in this. As Charles JA pointed out in *R v Moffatt* [[1998] 2 VR 229 at 260] (a case in which there was an unsuccessful challenge, on similar grounds, to Victorian legislation providing for the imposition of indefinite sentences on dangerous persons convicted of certain serious offences), it might be thought surprising that there would be an objection to having detention decided upon by a court, whose proceedings are in public, and whose decisions are subject to appeal, rather than by executive decision. Furthermore, as Williams JA pointed out in this case, there is other Queensland legislation [s 163 of the *Penalties and Sentences Act* 1992 (Qld)] under which indefinite detention may be imposed at the time of sentencing violent sexual offenders who are regarded as a serious danger to the community. If it is lawful and appropriate for a judge to make an assessment of danger to the community at the time of sentencing, perhaps many years before an offender is due to be released into the community, it may be thought curious that it is inappropriate for a judge to make such an assessment at or near the time of imminent release, when the danger might be assessed more accurately.

There are important issues that could be raised about the legislative policy of continuing detention of offenders who have served their terms of imprisonment, and who are regarded as a danger to the community when released. Substantial questions of civil liberty arise. This case, however, is not **[53]** concerned with those wider issues. The outcome turns upon a relatively narrow point, concerning the nature of the function which the Act confers upon the Supreme Court. If it is concluded that the function is not repugnant to the institutional integrity of that Court, the argument for invalidity fails.

Gleeson CJ went on to recall the tragic history of the *Veen* case: a life sentence reduced to a term of 12 years by a compassionate High Court in *Veen v The Queen [No 1]* (1979) 143 CLR 458, only to see a new life sentence, imposed after further killing, upheld by the High Court in *Veen v The Queen [No 2]* (1988) 164 CLR 465. He noted the wish expressed by Deane J in *Veen [No 2]* for a statutory system which could "**[495]** avoid the disadvantages of indeterminate prison sentences by being based on periodic orders for continuing detention in an institution other than a gaol and provide a guarantee of regular and thorough review by psychiatric and other experts". He also quoted at length from the observations of Chief Judge Clement Haynsworth (United States Court of Appeals, Fourth Circuit), in *United States v Chandler*, 393 F 2d 920 (1968), emphasising that ultimately: "**[929]** The law must proceed upon the assumption that man, generally, has a qualified freedom of will, and that any individual who has a substantial capacity for choice should be subject to its sanctions." (Compare Lon L Fuller, *The Morality of Law* (Yale University Press, 1 ed 1964) 162-67.) Gleeson CJ summed up these reflections by saying:

Gleeson CJ: [55] The way in which the criminal justice system should respond to the case of the prisoner who represents a serious danger to the community upon release is an almost intractable problem. No doubt, predictions of future danger may be unreliable, but, as the case of *Veen* shows, they may also be right. Common law sentencing principles, and some legislative regimes, permit or require such predictions at the time of sentencing, which will often be many years before possible release. If, as a matter of policy, the unreliability of such predictions is a significant factor, it is not necessarily surprising to find a legislature attempting to postpone the time for prediction until closer to the point of release.

Turning to the *Kable* issue, he said:

Gleeson CJ: [56] The decision in *Kable* established the principle that, since the Constitution established an integrated Australian court system, and contemplates the exercise of federal jurisdiction by State Supreme Courts, State legislation which purports to confer upon such a court a function which substantially impairs its institutional integrity, and which is therefore incompatible with its role as a repository of federal jurisdiction, is invalid.

The New South Wales legislation in question in that case provided for the preventive detention of only one person, Mr Kable. As was pointed out by Dawson J [189 CLR at 68-9], the final form of the legislation had a number of curious features, because of its parliamentary history. It was originally framed as a law of general application, but an amendment confined its application to the appellant. The object of the statute in its final form was said to be to protect the community by providing for the preventive detention of Gregory Wayne Kable. Toohey J [189 CLR at 98] said that the extraordinary character of the legislation and of the functions it required the Supreme Court to perform was highlighted by the operation of the statute upon one named person only. In that respect, he said, the statute was virtually unique. Senior counsel for the appellant in the case argued that the legislation was not a carefully calculated legislative response to a general social problem; it was legislation *ad hominem*. That argument was accepted. The members of the Court in the majority considered that the appearance of institutional impartiality of the Supreme Court was seriously damaged by a statute which drew it into what was, in substance, a political exercise.

The minor premise of the successful argument in *Kable* was specific to the legislation there in question. It is the major premise – the general principle – that is to be applied in the present case …

[T]he suggested ground of invalidity is that identified in the decision in *Kable*; a ground based upon the involvement of the Supreme Court in the decision-making process as to detention. Indeed, in the course of argument, senior counsel for the appellant acknowledged that his challenge to the validity of the Act would disappear if the power to make the relevant decision were to be vested in a panel of psychiatrists (or, presumably, retired judges).

[57] The Act is a general law authorising the preventive detention of a prisoner in the interests of community protection. It authorises and empowers the Supreme Court to act in a manner which is consistent with its judicial character. It does not confer functions which are incompatible with the proper discharge of judicial responsibilities or with the exercise of judicial power. It confers a substantial discretion as to whether an order should be made, and if so, the type of order. If an order is made, it might involve either detention or release under supervision. The onus of proof is on the Attorney-General. The rules of evidence apply. The discretion is to be exercised by reference to the criterion of serious danger to the community. The Court is obliged, by s 13(4) of the Act, to have regard to a list of matters that are all relevant to that criterion. There is a right of appeal. Hearings are conducted in public, and in accordance with the ordinary judicial process. There is nothing to suggest that the Supreme Court is to act as a mere instrument of government policy. The outcome of each case is to be determined on its merits.

It might be thought that, by conferring the powers in question on the Supreme Court of Queensland, the Queensland Parliament was attempting to ensure that the powers would be exercised independently, impartially, and judicially. Unless it can be said that there is something inherent in the making of an order for preventive, as distinct from punitive, detention that compromises the institutional integrity of a court, then it is hard to see the foundation for the appellant's argument …

It cannot be a serious objection to the validity of the Act that the law which the Supreme Court of Queensland is required to administer relates to a subject that is, or may be, politically divisive or sensitive. Many laws enacted by parliaments and administered by courts are the outcome of political controversy, and reflect controversial political opinions. The political process is the mechanism by which representative democracy functions. It does not compromise the integrity of courts to give effect to valid legislation. That is their duty. Courts do not operate in a politically sterile environment. They administer the law, and much law is the outcome of political action.

It was argued that the test, posed by s 13(2), of "an unacceptable risk that the prisoner will commit a serious sexual offence" is devoid of practical content. On the contrary, the standard of "unacceptable risk" was referred to by this Court **[58]** in *M v M* [(1988) 166 CLR 69] in the context of the magnitude of a risk that will justify a court in denying a parent access to a child. The Court warned against "striving for a greater degree of definition than the subject is capable of yielding" [166 CLR at 78]. The phrase is used in the *Bail Act 1980* (Q), which provides that courts may deny bail where there is an unacceptable risk that an offender will fail to appear (s 16). It is not devoid of content, and its use does not warrant a conclusion that the decision-making process is a meaningless charade.

In some of the reasons in *Kable*, references were made to the capacity of the legislation there in question to diminish public confidence in the judiciary. Those references were in the context of a statute that was held to impair the institutional integrity of a court and involve it in an *ad hominem* exercise. Nothing that was said in *Kable* meant that a court's opinion of its own standing is a criterion

of validity of law. Furthermore, nothing would be more likely to damage public confidence in the integrity and impartiality of courts than judicial refusal to implement the provisions of a statute upon the ground of an objection to legislative policy. If courts were to set out to defeat the intention of Parliament because of disagreement with the wisdom of a law, then the judiciary's collective reputation for impartiality would quickly disappear. This case involves no question of the interpretation of an ambiguous statute, or of the application of the common law. It concerns a specific challenge to the validity of a State law on the ground that it involves an impermissible attempt to resolve a certain kind of problem through the State's judicial process.

McHugh J: [60] [T]he legislation that the Court declared invalid in *Kable* was extraordinary. Section 3(1) of that Act declared that the object of the Act was "to protect the community by providing for the preventive detention ... of Gregory Wayne Kable." Section 3(3) declared that it "authorises the making of a detention order against Gregory Wayne Kable and does not authorise the making of a detention order against any other person." It was thus *ad hominem* legislation that, although dressed up as a Supreme Court legal proceeding, had been enacted for the purpose of ensuring that Kable remained in prison when his sentence expired …

The differences between the legislation considered in *Kable* and the Act are substantial. First, the latter Act is not directed at a particular person but at all persons who are serving a period of imprisonment for "a serious **[61]** sexual offence" [ss 2, 5, 13]. Second, when determining an application under the Act, the Supreme Court is exercising judicial power. It has to determine whether, on application by the Attorney-General, the Court is satisfied that "there is an unacceptable risk that the prisoner will commit a serious sexual offence" if the prisoner is released from custody [s 13(2)]. That issue must be determined in accordance with the rules of evidence [s 13(3)]. It is true that in form the Act does not require the Court to determine "an actual or potential controversy as to existing rights or obligations" [*R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 375]. But that does not mean that the Court is not exercising judicial power. The exercise of judicial power often involves the making of orders upon determining that a particular fact or status exists. It does so, for example, in the cases of matrimonial causes, bankruptcy, probate and the winding up of companies. The powers exercised and orders made by the Court under this Act are of the same jurisprudential character as in those cases. The Court must first determine whether there is "an unacceptable risk that the prisoner will commit a serious sexual offence". That is a standard sufficiently precise to engage the exercise of State judicial power. Indeed, it would seem sufficiently precise to constitute a "matter" that could be conferred on or invested in a court exercising federal jurisdiction. Third, if the Court finds that the Attorney-General has satisfied that standard, the Court has a discretion as to whether it should make an order under the Act and, if so, what kind of order [s 13(5)]. The Court is not required or expected to make an order for continued detention in custody. The Court has three discretionary choices open to it if it finds that the Attorney-General has satisfied the "unacceptable risk" standard. It may make a "continuing detention order", a "supervision order" or no order [s 13(5)]. Fourth, the Court must be satisfied of the "unacceptable risk" standard "to a high degree of probability" [s 13(3(b)]. The Attorney-General bears the onus of proof. Fifth, the Act is not designed to punish the prisoner. It is designed to protect the community against certain classes of convicted sexual offenders who have not been rehabilitated during their period of imprisonment. The objects of the Act expressed in s 3 are:

> "(a) to provide for the continued detention in custody or supervised release of a particular class of prisoner to ensure adequate protection of the community; and
>
> (b) to provide continuing control, care or treatment of a particular class of prisoner to facilitate their rehabilitation."

Sixth, nothing in the Act or the surrounding circumstances suggests that the jurisdiction conferred is a disguised substitute for an ordinary legislative or **[62]** executive function. Nor is there anything in the Act or those circumstances that might lead to the perception that the Supreme Court, in exercising its jurisdiction under the Act, is acting in conjunction with, and not independently of, the Queensland legislature or executive government.

Does the Act compromise the institutional integrity of the Supreme Court of Queensland?

With great respect to those who hold the contrary view, nothing in the Act or the surrounding circumstances gives any ground for supposing that the jurisdiction conferred by the Act compromises the institutional integrity of the Supreme Court of Queensland. Nothing in the Act gives any ground for concluding that it impairs the institutional capacity of the Supreme Court to exercise federal

jurisdiction that the Federal Parliament has invested or may invest in that Court. Nothing in the Act might lead a reasonable person to conclude that the Supreme Court of Queensland, when exercising federal jurisdiction, might not be an impartial tribunal free of governmental or legislative influence or might not be capable of administering invested federal jurisdiction according to law …

[65] In my opinion, ... *Kable* is a decision of very limited application. That is not surprising. One would not expect the States to legislate, whether by accident or design, in a manner that would compromise the institutional integrity of their courts. *Kable* was the result of legislation that was almost unique in the history of Australia. More importantly, however, the background to and provisions of the *Community Protection Act* pointed to a legislative scheme enacted solely for the purpose of ensuring that Mr Kable, alone of all people in New South Wales, would be kept in prison after his term of imprisonment had expired. The terms, background and parliamentary history of the legislation gave rise to the perception that the Supreme Court of that State might be acting in conjunction with the New South Wales Parliament and the executive government to keep Mr Kable in prison. The combination of circumstances which gave rise to the perception in *Kable* is unlikely to be repeated. The *Kable* principle, if required to be applied in future, is more likely to be applied in respect of the terms, conditions and manner of appointment of State judges or in circumstances where State judges are used to carry out non-judicial functions, … than in the context of *Kable*-type legislation.

In this case, it is impossible to conclude that the Queensland Parliament or the executive government of that State might be working in conjunction with the Supreme Court to continue the imprisonment of the appellant. Nor is it possible to conclude that the Act gives rise to a perception that the Supreme Court of Queensland might not render invested federal jurisdiction impartially in accordance with federal law. The Act is not directed to a particular person but to a class of persons that the Parliament might reasonably think is a danger to the community. Far from the Act giving rise to a perception that the Supreme Court of Queensland is acting in conjunction with the Queensland Parliament or the executive government, it shows the opposite. It requires the Court to adjudicate on the claim by the Executive that a prisoner is "a serious danger to the community" in accordance with the rules of evidence and "to a high degree of probability". Even if the Court is satisfied that there is an unacceptable risk that the prisoner will commit a serious sexual offence if released from custody, the Court is not required to order the prisoner's continued detention or supervised release. Furthermore, the Court must give detailed reasons for its order [s 17], reasons that are inevitably subject to public scrutiny. It is impossible to hold, therefore, **[66]** that the Queensland Parliament and the executive government intend that the appellant's imprisonment should continue and that they have simply used the Act "to cloak their work in the neutral colors of judicial action" [*Mistretta v United States*, 488 US 361 at 407 (1989)]. On the contrary, the irresistible conclusion is that the Queensland Parliament has invested the Supreme Court of Queensland with this jurisdiction because that Court, rather than the Parliament, the executive government or a tribunal such as a Parole Board or a panel of psychiatrists, is the institution best fitted to exercise the jurisdiction.

Callinan and Heydon JJ: [107] In *Kable*, this Court found that the *Community Protection Act* 1994 (NSW) was incompatible with Ch III of the Commonwealth Constitution, and therefore invalid, because it effectively required a Judge of the Supreme Court of **[108]** New South Wales to make an order depriving a named person of his liberty at the expiration of his term of imprisonment. The majority was of the opinion that the *Community Protection Act* compromised the integrity of the judicial system established by Ch III because it obliged the Supreme Court of New South Wales, a Court which exercised the judicial power of the Commonwealth from time to time, to act non-judicially when exercising State jurisdiction.

In *Kable*, the Justices in the majority used differing formulations when stating the principles, but all of them referred to constitutional integrity, or public confidence, or both. With respect to the powers purportedly conferred by the *Community Protection Act*, Toohey J held that they were incompatible with the exercise of the judicial power of the Commonwealth because they were of such a nature that public confidence in the integrity of the judiciary as an institution was diminished [189 CLR at 98]. Gaudron J said that they compromised the integrity of the judicial system brought into existence by Ch III of the Constitution, which depends on State courts acting in accordance with the judicial process and on the maintenance of public confidence in that process [189 CLR at 107]. The opinion of McHugh J was that the impugned conferral of non-judicial power or other incidents of the Court should not be such as could lead an ordinary reasonable member of the public to conclude that the Court was not independent of the executive government of the State, or that the Court as an institution

was not free of governmental influence in administering the judicial functions invested in the Court, and compromised the institutional impartiality of the Court [189 CLR at 117, 119, 121]. Gummow J was of the view that the exercise of statutory powers jeopardized the integrity of the Court, and sapped the appearance of institutional impartiality, and the maintenance of public confidence in the judiciary [189 CLR at 133].

Detention under the Act is for non-punitive purposes

It is accepted that in some circumstances, it is valid to confer powers on both non-judicial and judicial bodies to authorize detention, for example, in cases of infectious disease or mental illness. These categories are not closed. In this respect, the second object of the Act [in s 3(b)] is relevant:

> "[T]o provide continuing control, care or treatment of a particular class of prisoner to facilitate their rehabilitation."

To the extent that the Act in fact furthers this object, a court applying it would be undertaking, without compromise to its judicial integrity, a conventional adjudicative process.

To determine whether detention is punitive, the question, whether the impugned law provides for detention as punishment or for some legitimate non-punitive purpose, has to be answered. As Gummow J said in *Kruger v The Commonwealth* [(1997) 190 CLR 1 at 162]:

> "The question whether a power to detain persons or to take them into custody is to be characterised as punitive in nature, so as to attract the operation of Ch III, depends upon **[109]** whether those activities are reasonably capable of being seen as necessary for a legitimate non-punitive objective. The categories of non-punitive, involuntary detention are not closed." (footnotes omitted)

Several features of the Act indicate that the purpose of the detention in question is to protect the community and not to punish. Its objects are stated to be to ensure protection of the community and to facilitate rehabilitation [s 3(a)]. The focus of the inquiry in determining whether to make an order under ss 8 or 13 is on whether the prisoner is a serious danger, or an unacceptable risk to the community. Annual reviews of continuing detention orders are obligatory [s 27].

In our opinion, the Act, as the respondent submits, is intended to protect the community from predatory sexual offenders. It is a protective law authorizing involuntary detention in the interests of public safety. Its proper characterization is as a protective rather than a punitive enactment. It is not unique in this respect. Other categories of non-punitive, involuntary detention include: by reason of mental infirmity; public safety concerning chemical, biological and radiological emergencies; migration; indefinite sentencing; contagious diseases and drug treatment. This is not to say however that this Court should not be vigilant in ensuring that the occasions for non-punitive detention are not abused or extended for illegitimate purposes.

One further submission of the appellant requires consideration. He contended that the Act was a Bill of Pains and Penalties, that is, a "legislative enactment which inflicts punishment without a judicial trial" [*Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 535-6] …

[110] The Act here is not such a bill. Its purpose is not to punish people for their past conduct. It is a protective measure and provides, in any event, for many of the safeguards of a judicial trial. It is necessary to keep in mind the issues with which *Kable* was concerned and the true nature of the decision which the Court made there. Despite the differing formulations of the Justices in the majority, the primary issue remained whether the process which the legislation required the Supreme Court of New South Wales to undertake, was so far removed from a truly judicial process that the Court, by undertaking it, would be so tainted or polluted that it would no longer be a suitable receptacle for the exercise of Federal judicial power under Ch III of the Constitution. This Court did not in *Kable* hold however that in all respects, a Supreme Court of a State was the same, and subject to the same constraints, as a federal court established under Ch III of the Constitution.

Both in *Baker* and in *Fardon*, Kirby J was the sole dissenter. In *Baker*, he insisted that what had been said by Mr Whelan and others in the Legislative Assembly "**[19]** leaves no doubt that the purpose of the bill … was to ensure that, in its application to the appellant and the other named prisoners, there would be no repetition of the possibility opened up by the order made in the case of Mr Crump". Mr Whelan's statement made it "**[26]** quite clear that the purpose of the impugned provisions was to tell 'judges that we, the Parliament and the community, do not expect these most serious offenders ever to be released' … **[27]** Reading

these passages should create a heightened vigilance on the part of a court such as this, whose duty is to protect the integrity of the judicial power and, relevantly, to repel attempts to 'dress up' as a judicial function the making of orders which, in truth, are designed to implement the clearly stated parliamentary objective that the named 'animals, including the appellant, never 'see the exit sign at the prison gate'." The enactment "**[27]** was an attempt to involve the judiciary in the performance of punitive decisions effectively already determined by Parliament itself".

It had been suggested during argument that this use of the debates might be contrary to Article 9 of the *Bill of Rights* 1688 (see Chapter 2, §2(d)). Kirby J rejected this suggestion, since there was no "**[19]** reflection on the right of members of the New South Wales Parliament to speak in the chamber as they please". He pointed out that judicial recourse to parliamentary debates as an aid to statutory interpretation is nowadays a common practice. "**[35]** We should not turn a blind eye to such statements because, in this instance, they are inconvenient and tend to manifest constitutional invalidity in the legislative product."

He also held that "**[27]** the legislation is *ad hominem* in nature", since its operation "**[27]** is clearly confined to the [ten] nominated prisoners". On this point he thought that *Nicholas* was distinguishable: although, at the time of its enactment, the legislation in that case was applicable only to five identified persons, the class of cases to which it applied "**[27]** was stated in terms of general application", so that more instances might occur in the future. By contrast, in the *Baker* case, "**[27]** there could never be any addition to the class of prisoners serving existing life sentences against whom there was a judicial 'non-release recommendation' made at the time they were originally sentenced". The class was closed.

He also accepted the argument that it was "**[31]** seriously arbitrary and discriminatory" to delimit the class by reference to the fact that a "non-release recommendation" had been made, given that the judicial practice of making or not making such declarations had varied so widely, according to judicial "**[32]** differences of personality, temperament and emotion". In *Ryan v The Queen* (2001) 206 CLR 267, he and Hayne J had warned that judicial emotions should be kept in check in such cases. In *Jamieson, Elliott and Blessington* (1992) 60 A Crim R 68 – the Janine Balding case, involving three of the ten men now affected by s 13A(3A) – a New South Wales Court of Criminal Appeal presided over by Gleeson CJ had expressly disapproved of the practice of making such recommendations, saying in part that "**[80]** especially where the offender is a young person, and there are so many different possibilities as to what might happen in the future, it is normally not appropriate for a sentencing judge to seek to anticipate decisions that might fall to be made by other persons, and in other proceedings, or under other legislation, over the ensuing decades". In any event, said Kirby J, such recommendations had no legal effect. "**[32]** For Parliament to select non-normative, non-binding and possibly emotional remarks in one judge's reasons for sentence as the ground, decades later, to control the judicial orders of contemporary judges is to impose on the latter obligations of arbitrary conduct by reference to a discriminatory criterion" – discriminatory, because the result in such cases was effectively to exclude any possibility of a redetermination of sentence, whereas, in cases where no such recommendation was made, such redeterminations "**[32]** *have* been made … in crimes of comparable gravity (including crimes by triple murderers)".

Kirby J acknowledged that the exercise of discretion conditioned on "special reasons" "**[34]** may sometimes constitute a permissible, even orthodox, exercise of judicial power". However, he insisted that the phrase "special reasons" must be read in context. The relevant context was supplied in part by the history of the legislation (including the parliamentary debates), and in part by the implicit contrast between "**[35]** special" and "ordinary" reasons, which implied that the "ordinary" reasons for making a redetermination would not be sufficient. This was borne out by the fact that in Baker's case itself, very strong supportive evidence of rehabilitation, "**[21]** exemplary" behaviour, and "**[21]** very low" risk of

recidivism, had not been considered sufficient to meet the need for "special reasons". The examples of what might constitute "special reasons" referred to in the judgment of Gleeson CJ were dismissed by Kirby J as "**[36]** fantastic possibilities of heroic prison rescues or intramural community service", in any event dependent on "**[36]** chance possibilities ordinarily outside the prisoner's own control", and thus confirming that the "exception" for "special reasons" was "**[36]** included to permit the conscription of judges of the New South Wales Supreme Court into a charade pretending to the availability of discretion … when in truth it was intended to ensure that the judges could never, in law or fact, order the eligibility for release of any of the named offenders".

Kirby J also held that the impugned legislation was effectively retroactive, since it "**[27]** undoubtedly has the effect **[28]** of altering the punishment which the appellant and other affected prisoners were to suffer under the judicial sentence imposed upon them at the time of their initial convictions". As is now usual in constitutional cases, Kirby J appealed (at 36-38) to international law, contending that a retroactive increase in punishment was in breach of the 1966 International Covenant on Civil and Political Rights (see Chapter 18, §2). Moreover, he noted that one of the persons named in Parliament, Bronson Blessington, had been 14 years old at the time of his offence – so that, in its application to him, the substantive effect of the legislation was clearly in breach of the prohibition, in Art 37 of the 1989 Convention on the Rights of the Child, of "life imprisonment without possibility of release" as a punishment for "offences committed by persons below eighteen years of age".

More generally, Kirby J protested against "**[17]** an unduly narrow appreciation of the doctrine, in effect treating *Kable* as a constitutional guard-dog that would bark but once". He insisted that constitutional issues call for an approach to legislation "**[17]** from the standpoint of substance, not mere form …; **[18]** not a narrow approach befitting consideration of the validity of regulations made under a *Dog Act*". He was wary of the rule-of-thumb derived from *Bachrach* and from *Silbert*, that if a law would be compatible with Chapter III of the Constitution if enacted at federal level, it must necessarily be valid under *Kable*. He conceded that the testing of State legislation against standards derived from Chapter III "**[25]** may sometimes be a useful step"; but he warned that because it "**[25]** involves an hypothesis prone to artificiality …, care must be taken to avoid unnecessary dependence on such fictions. The safer course is to measure the State legislation by reference to the *Kable* standard, and not to become unduly diverted by considering what would have been the case if the State law were something it was not."

He discounted the references made in *Kable* to loss of public confidence in the courts: "**[23]** A court is not well placed to estimate with precision the impact, if any, of particular legislation upon public opinion. At most, the reference to this consideration constitutes a legal fiction, constructed by judges in an attempt to explain and objectify their conclusions." The importance of *Kable* is "**[25]** not for the protection of the judiciary, as such, but for the protection of all people in the Commonwealth." On the other hand, in a sideswipe at the decision in *Austin v Commonwealth* (2003) 195 ALR 321 (see Chapter 23, §3), he asserted: "**[25]** Upholding the constitutional implication expressed in *Kable* is at least as important for the defence of the independence and integrity of the judiciary in this country as giving effect to a hitherto undiscovered constitutional implication limiting the imposition of federal taxes on some State judicial pension rights."

He saw in the parliamentary debate of May 1997 a chilling example of "**[20]** the bidding contest in extreme punishments in which the members of Parliament had become involved", and warned that: "**[20]** Subject to the Constitution, only the courts of this country stand as guardians of proportionality and the avoidance of serious excesses and departures from … human rights". The laws at issue in *Baker* and *Fardon* were in his view "**[39]** extreme examples of invasions of the real functions secured to the State judiciary by the Australian Constitution as stated … in *Kable*", and the failure of the majority to strike them down "**[39]**

shows that that decision is a dead letter. At least it is so until a future time perceives its importance for the protection of fundamental rights in this country."

In *Fardon*, again as the sole dissenter, Kirby J expanded on these themes.

> **Kirby J: [82]** The appellant points out that the sentences of imprisonment imposed on him in 1989 have been served in their entirety. Nevertheless, pursuant to orders made under the Act, the appellant has remained a prisoner, incarcerated in the Townsville Correctional Centre after the date of the expiry of his sentences. This has occurred without allegation, still less proof, of any further offence by **[83]** him, or breach of the law. He complains that, effectively, his judicial punishment has been extended …
>
> > "because opinions have been formed, probably on material which would not be admissible in a legal proceeding and on a standard other than beyond reasonable doubt, that [he] will commit a serious sexual offence as defined if released from custody, or at least unsupervised custody, after completing [his] sentenced terms of imprisonment" [*Fardon* [2003] QCA 416 at [91]].
>
> Experts in law, psychology and criminology have long recognised the unreliability of predictions of criminal dangerousness. In a recent comment ["Sentencing Review 2002-2003" (2003) 27 *Criminal Law Journal* 325 at 338], Professor Kate Warner remarked:
>
> > "[A]n obstacle to preventive detention is the difficulty of prediction. Psychiatrists notoriously overpredict. Predictions of dangerousness have been shown to have only a one-third to 50% success rate. While actuarial predictions have been shown to be better than clinical predictions – an interesting point as psychiatric or clinical predictions are central to continuing detention orders – neither are accurate."
>
> Judges of this Court have referred to such unreliability. Even with the procedures and criteria adopted, the Act ultimately deprives people such as the appellant of personal liberty, a most fundamental human right, on a prediction of dangerousness, based largely on the opinions of psychiatrists which can only be, at best, an educated or informed "guess". The Act does so in circumstances, and with consequences, that represent a departure from past and present notions of the judicial function in Australia.
>
> As the Act's provisions show, it targets people who "will almost inevitably be unpopular with the community and the media who can be expected to take considerable interest in orders of the type sought under the Act" [[2003] QCA 416 at [91]]. As framed, the Act is invalid. It sets a very bad example, which, unless stopped in its tracks, will expand to endanger freedoms protected by the Constitution. In this country, judges do not impose punishment on people for their beliefs, however foolish or undesirable they may be regarded, nor for future crimes that people fear but which those concerned have not committed. In strictly limited circumstances, the judiciary permits "executive interference with the liberty of the individual" where "the purpose of the imprisonment is to achieve some **[84]** legitimate non-punitive object" [*Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 56, 71]. Despite some attempts to give the Act that appearance, that is not the true meaning and effect of its terms. The appellant's continued imprisonment is unlawful. Having served his lawful sentences, he should be released forthwith …
>
> **[85]** I do not pretend that the ultimate issue raised by these proceedings is cut and dried. The validity of similar enactments has repeatedly divided the Supreme Court of the United States … In this country, the *Kable* principle has so far proved a weak protection against State legislation said to have intruded impermissibly into the judicial function. In only one case has the principle been upheld and applied by this Court, namely in *Kable* itself. What was seen at first to be an important assurance that the State judiciary in Australia (certainly the named Supreme Courts) enjoyed many of the constitutional protections of the federal judiciary, has repeatedly been revealed as a chimera.
>
> **[86]** I disagree with this approach …. In my opinion, *Kable* is especially important when the rights of unpopular minorities are committed to the courts. That is when legislatures may be tempted to exceed their constitutional powers, involving the independent judiciary in incompatible activities so as to cloak serious injustices with the semblance of judicial propriety. Against such risks, Ch III of the Constitution stands guard. This Court should be vigilant to uphold such protection. That is what the principle in *Kable* requires.

The Kable *principle*

Avoiding repugnance to Ch III: Too much has been made of the differing ways in which the majority in *Kable* expressed their respective reasons for upholding the constitutional objection to the

Community Protection Act 1994 (NSW), challenged in that case. The essential idea was relatively clear and simple. Because State courts (and unavoidably State Supreme Courts named in the Constitution) may be vested with federal jurisdiction which they are then bound to exercise, they must exhibit certain basic qualities as "courts" fit for that function.

In short, State courts must remain at all times curial receptacles proper to the exercise of federal jurisdiction. Although they are not, as such, federal courts, subject to the express strictures of Ch III, their inclusion in the integrated judicature of the Commonwealth, the provisions for appeals from them to federal courts and the facility for the vesting of federal jurisdiction all imply that they cannot be required by State law to perform functions inconsistent with ("repugnant to") Ch III.

In particular instances of challenge, it falls to the courts themselves (ultimately this Court), to explain the contents of the *Kable* principle. The principle must be given meaning in a context that respects the different constitutional origins and histories of State courts; but which also upholds the implications necessary to their undoubted place within the judicature envisaged by the federal Constitution. Just as the States of Australia are not, constitutionally speaking, merely the colonies renamed, so State courts, after Federation (and specifically State Supreme Courts named in the Constitution) derive particular functions and characteristics from the federal Constitution itself. These requirements are not identical to those imposed explicitly on federal courts. However, they cannot be so different from such requirements as to undermine the integrated scheme for the national judicature which the Constitution creates.

Self-evidently, a conclusion that legislation infringes the Constitution and is for that reason invalid is a serious one. The only justification for such a conclusion can be the Constitution itself. It cannot depend on the whim of judges to set aside an unliked law that has been made by the vote of a majority of the representatives of the people, elected to Parliament. However, just as the **[87]** legislators have their functions under the Constitution, so do the courts. If any branch of government neglects, or exceeds, its functions, the harmony envisaged by the Constitution is disturbed.

Within the system of representative government created by the Constitution, legislators sometimes respond to waves of community fear and emotion, occasionally promoted by sections of the media. As this Court demonstrated in *Australian Communist Party v The Commonwealth* ("the *Communist Party Case*") [(1951) 83 CLR 1], its function, derived from the Constitution, responds to a time frame that is much longer than that of the other branches of government. Inevitably, it affords a constitutional corrective to transient passions and, sometimes, to ill-considered laws repugnant to the timeless constitutional design.

This is what I take *Kable* to require. It forbids attempts of State Parliaments to impose on courts, notably Supreme Courts, functions that would oblige them to act in relation to a person "in a manner which is inconsistent with traditional judicial process" [189 CLR at 98]. It prevents attempts to impose on such courts "proceedings [not] otherwise known to the law", that is, those not partaking "of the nature of legal proceedings" [189 CLR at 106]. It proscribes parliamentary endeavours to "compromise the institutional impartiality" of a State Supreme Court [189 CLR at 121]. It forbids the conferral upon State courts of functions "repugnant to judicial process" [189 CLR at 134].

Recent, and not so recent, experience teaches that governments and parliaments can, from time to time, endeavour to attract electoral support by attempting to spend the reputational currency of the independent courts in the pursuit of objectives which legislators deem to be popular. Normally, this will be constitutionally permissible and legally unchallengeable. However, as *Kable* demonstrates, a point will be reached when it is not, however popular the law in question may at first be. The criteria for the decision are stated in *Kable* in general terms. Yet such is often the case in constitutional adjudication. Evaluation and judgment are required of judicial decision-makers responding, as they must, to enduring values, not to immediate acclaim.

Protection of the legal and constitutional rights of minorities in a representative democracy such as the Australian Commonwealth is sometimes unpopular. This is so whether it involves religious minorities, communists, illegal drug importers, applicants for refugee status, or persons accused of **[88]** offences against anti-terrorist laws. Least of all is it popular in the case of prisoners convicted of violent sexual offences or offences against children. Yet it is in cases of such a kind that the rule of law is tested. As Latham CJ pointed out long ago, in claims for legal protection, normally, "the majority of the people can look after itself": constitutional protections only really become important in the case of "minorities, and, in particular, of unpopular minorities" [*Adelaide Company of Jehovah's*

Witnesses Inc v Commonwealth (1943) 67 CLR 116 at 124]. It is in such cases that the adherence of this Court to established constitutional principle is truly tested, as it is in this case.

The implications of Kable: A number of propositions about the ambit of the *Kable* principle can be derived from the case itself and from subsequent decisions:

(1) The circumstances that will invoke the principle of repugnance must be "extraordinary" [189 CLR at 98]. Despite occasional derogations, Australian legislatures are normally respectful of the separation of the judicial power and of the constitutional functions assigned to the courts. Yet this adjective ("extraordinary") gives little guidance in a particular case. Such appellations tend to depend on the eye of the beholder;

(2) The law considered in *Kable* was directed at one person only. Here, the Act is drafted as one of apparently general application. It has already been invoked in cases other than that of the appellant. Nevertheless, it is unthinkable that *Kable* was a stand-alone decision, concerned to state a constitutional principle limited to only one case and never to be repeated. It is sufficient to attract the *Kable* rule that the impugned law should apply to a small number of identifiable persons, singled out for special treatment. It could not be denied that the Act in issue in this appeal is concerned with a small, limited and defined class, identified with relative ease. To that extent, it invites *Kable* scrutiny;

(3) All judges in the majority in *Kable* referred to the importance of maintaining community confidence in the integrity of the courts. However, as such, this is not a criterion for the application of the *Kable* principle. It is what will be lost as a result of neglecting the considerations which the principle defends. Such a view of what was meant by the reasons of the majority in *Kable* is increasingly accepted. It is singularly inappropriate to place undue emphasis on the fiction of public perceptions in this context. At the time of a constitutional challenge on this basis, it is quite possible that the public will share, at least in the short run, some of the passions that may have led to the legislation under consideration. So it may have been in *Kable*. **[89]** So it may have been at first in the *Communist Party Case* ...

(4) Occasionally, it is useful to test the suggested repugnancy to Ch III of the impugned State law by asking whether, if enacted by the Federal Parliament, its provisions would have passed muster in relation to a federal court. If they would, the "occasion for the application of *Kable* does not arise" [*Bachrach*, 195 CLR at 561-2]. However, I agree with Callinan and Heydon JJ that this test is not "the exclusive test of validity" of a State law measured by the *Kable* standard …

(5) If it is shown that the jurisdiction and powers conferred on a State court could not be conferred on a federal court, the party [challenging the State law] … is well advanced in making good the *Kable* argument. This is because of the integrated character of the Australian judiciary, both in terms of Ch III and in fact. If one part of the nation's judiciary *could not* lawfully perform a specified function, there is a heavy burden of persuasion that another *could* do so. There are differences between the federal and State judiciaries in Australia. Most of them are concerned with the capability of the State judiciary to perform non-judicial functions prohibited to federal courts under the present understanding of the separation of judicial powers mandated by the federal Constitution. But where, outside this limited field of difference, a State Parliament has purportedly assigned to a State court the performance of functions that are unusual, beyond the traditional judicial process and repugnant to the ordinary judicial role, this Court will more readily come to the conclusion that the State law demonstrates *Kable* inconsistency …

[90] There are five features in the Act which, combined, indicate an attempted imposition upon the judges of the Supreme Court of Queensland functions repugnant to Ch III of the federal Constitution as explained in *Kable*. These features severally authorise the Supreme Court, contrary to traditional judicial process in Australia, to order:

(1) The civil commitment of a person to a prison established for the reception of prisoners, properly so-called;

(2) The detention of that person in prison, in the absence of a new crime, trial and conviction and on the basis of the assessment of future re-offending, not past offences;

(3) The imprisonment of the person in circumstances that do not conform to established principles relating to civil judicial commitment for the protection of the public, as on a ground of mental illness;

(4) The imposition of additional judicial punishment on a class of prisoners selected by the legislature in a manner inconsistent with the character of a court and with the judicial power exercised by it; and

(5) The infliction of double punishment on a prisoner who has completed a sentence judicially imposed by reference, amongst other things, to the criterion of that person's past criminal conduct which is already the subject of final judicial orders that are (or shortly will be) spent at the time the second punishment begins.

As to this last point, Kirby J again held (as he had done in *Baker*) that the imposition of continuing detention involved an additional retroactive punishment; and also (or alternatively) that it infringed the rule against double jeopardy. As to the other four points, he said:

Kirby J: [90] *Civil commitment unknown to law*: Generally speaking, in Australia, the involuntary detention of a person in custody by any agency of the state is viewed as penal or punitive in character. In Australian law, personal liberty has always been regarded as the most fundamental of rights. Self-evidently, liberty is not an absolute right. However, to deprive a person of liberty … is a grave step. If it is to extend for more than a very **[91]** short interval …, it requires the authority of a judicial order.

These rules explain a fundamental principle that lies deep in our law. Ordinarily, it requires officers of the Executive Government, who deprive a person of liberty, to bring that person promptly before the judicial branch, for orders that authorise, or terminate, the continued detention. The social purpose behind these legal obligations is to divorce, as far as society can, the hand that would deprive the individual of liberty from the hand that authorises continued detention. The former, which normally lies in the Executive branch, is taken to be committed to the deprivation of liberty for some purpose. The latter is taken to be independent and committed only to the application in the particular case of valid laws. The operation of the writ of *habeas corpus* is another assurance, afforded to the judiciary, requiring the prompt legal justification of any contested deprivation of liberty. So precious does our legal system regard every moment of personal freedom …

In *R v Quinn; Ex parte Consolidated Food Corporation* [(1977) 138 CLR 1 at 11], Jacobs J observed:

> "[W]e have inherited and were intended by our Constitution to live under a system of law and government which has traditionally protected the rights of persons by ensuring that those rights are determined by a judiciary independent of the parliament and the executive. But the rights referred to in such an enunciation are the basic rights which traditionally, and therefore historically, are judged by that independent judiciary which is the bulwark of freedom. The governance of a trial for the determination of criminal guilt is the classic example."

The necessary involvement of the judiciary in adjudging and punishing criminal guilt is a fixed feature of the courts participating in the integrated judicature of the Commonwealth, provided for in the Constitution. Precisely because liberty is regarded as so precious, legal provisions derogating from liberty (and especially those that would permit the Executive Government to deprive a person of liberty) are viewed by courts with heightened vigilance. Normally, a law providing for the deprivation of the liberty of an individual will be classified as punitive. As a safeguard against expansion of forms of administrative detention without court orders, our legal system has been at pains to insist that detention in custody must ordinarily be treated as penal or punitive, precisely because only the judiciary is authorised to adjudge and punish criminal **[92]** guilt. Were it otherwise, it would be a simple matter to provide by law for various forms of administrative detention, to call such detention something other than "punishment", and thereby to avoid the constitutional protection of independent judicial assessment before such deprivation is rendered lawful.

It is true that a limited number of exceptions to this constitutional scheme have been acknowledged by this Court. They include immigration detention of "unlawful non-citizens" for the purposes of deportation or to enable an application for an entry permit to be made and determined; quarantine detention for reasons of public health; detention of the mentally ill and the legally insane for the protection of the community; and analogous non-punitive, protective orders permitted by valid legislation [176 CLR at 25-6, 27-9]. This Court has assumed, or suggested, that the imposition by federal and State courts of sentences that involve indefinite periods of imprisonment is compatible with Ch III. Such provisions have a long history. In intermediate courts, they have been held compatible with *Kable* [eg by Hayne JA in *R v Moffatt* [1998] 2 VR 229]. This Court has also made it clear that the list of permissible burdens upon liberty, classified as "non-punitive," is not closed.

Nonetheless, where, as in the case of the Act, a new, different and so far special attempt is made by State legislation to press the judiciary into a function not previously performed by it, it is necessary to evaluate the new role by reference to fundamental principles. The categories of exception to deprivations of liberty treated as non-punitive may not be closed; but they remain exceptions. They are, and should continue to be, few, fully justifiable for reasons of history or reasons of principle developed by analogy with the historical derogations from the norm. Deprivation of liberty should continue to be seen for what it is …

In the case of the Act, the drafter has not even attempted a change of nomenclature to disguise the reality of the order assigned to the judiciary … The person the subject of the order is a "prisoner", convicted of a previous crime. He or she is already detained in prison and must be so at the time of the application and order. If the order under the Act is made, he or she is nominally detained as a "serious danger to the community". However, such continued detention is served in a prison and the detainee, **[93]** although having completed the service of imprisonment, remains a "prisoner". The detention continues under the "continuing detention order". From the point of view of the person so detained, the imprisonment "continues" exactly as it was.

Where a court is concerned with the constitutional character of an Act, its attention is addressed to actuality, not appearances. Were it otherwise, by the mere choice of legislative language and the stroke of a pen, the requirements of the Constitution could be circumvented …

The same point was made in *Chu Kheng Lim v Minister for Immigration* [176 CLR at 27]:

> "In exclusively entrusting to the courts designated by Ch III the function of the adjudgment and punishment of criminal guilt under a law of the Commonwealth, the Constitution's concern is with substance and not mere form."

The same rule must apply to the evaluation of a State law said to be incompatible with Ch III … Invalidity does not depend on verbal formulae or the proponent's intent. It depends upon the character of the law. Effectively, the Act does not provide for civil commitment of a person who has completed a criminal sentence. Had it done so, one would have expected commitment of that person to a different (non-prison) institution, with different incidents, different facilities, different availability of treatment and support designed to restore the person as quickly as possible to liberty …

Occasionally, for a very short interval and in exceptional circumstances, civil commitment to prison may occur. But that is not the character of the Act. It contemplates lengthy commitment, generally with assessment and reassessments at annual intervals. In Australia, we formerly boasted that even an hour of liberty was precious to the common law. Have we debased liberty so far that deprivation of liberty, for yearly intervals, confined in a prison cell, is now regarded as immaterial or insignificant? Under the Act, just as in the law invalidated in *Kable*, the prisoner could theoretically be detained for the rest of **[94]** the prisoner's life. This could ensue not because of any *past* crime committed, but because of a prediction of *future* criminal conduct.

In the United States, where post-sentence detention legislation has been enacted, such continuing detention is ordinarily carried out in different facilities, controlled by a different governmental agency, with different features to mark the conclusion of the punitive element of the judicial sentence and the commencement of a new detention with a different quality and purpose [*Kansas v Hendricks*, 521 US 346 at 368-9 (1997)]. The Queensland Act does not even pretend to make such distinctions. The realities are unashamedly displayed …

On its face, the Act hardly makes any effort to pretend to a new form of "civil commitment". To the extent that it does, it fails to disguise its true character, namely punishment. And, by Australian constitutional law, punishment as such is reserved to the judiciary for breaches of the law. An order of imprisonment as punishment can therefore only be made by a court following proof of the commission of a criminal offence, established beyond reasonable doubt where the charge is contested, in a fair trial at which the accused is found guilty by an independent court of the offence charged. Here there has been no offence; no charge; no trial … Instead, because of a prisoner's antecedents and criminal history, provision is made for a new form of additional punishment utilising the courts and the corrective services system in a way that stands outside the judicial process hitherto observed in Australia …

Predictive superadded imprisonment: Although the features of the criminal process in the common law have taken a "meandering course" over many centuries [*Azzopardi v The Queen* (2001) 205 CLR 50 at 65] it has been fundamental, until now, that (save for the remand of accused persons awaiting trial who are not granted bail) imprisonment has followed final proof of crime. It has not anticipated

the crime. Even remanded prisoners are imprisoned for defined and generally limited periods and *after* a **[95]** fresh crime is alleged to have occurred. In our system of criminal justice, prisons are therefore a place of punishment for *past* wrong-doing. By a sentence that includes imprisonment, a judge communicates the censure of society deserved by the prisoner for proved *past* crimes. Imprisonment is not used as punishment *in advance* for crimes feared, anticipated or predicted in the future. To introduce such a notion of punishment, and to require courts to impose a prison sentence in respect of perceived *future* risks, is a new development. It is one fraught with dangers and "inconsistent with traditional judicial process" [189 CLR at 98].

The focus of the exercise of judicial power upon past events is not accidental. It is an aspect of the essential character of the judicial function. Of its nature, judicial power involves the application of the law to *past* events or conduct. Although, in discharging their functions, judges are often called upon to predict future happenings, an order imprisoning a person because of an estimate of some future offence is something new and different.

Simply calling the imprisonment by a different name ("detention") does not alter its true character or punitive effect. Least of all does it do so in the case of an Act that fixes on the subject's status as a "prisoner" and "continues" the type of "detention" that previously existed, that is, punitive imprisonment. Such an order, superimposed at the end of judicial punishment for past crimes, must be distinguished from an order imposing imprisonment for an indeterminate period also for past crimes that is part of the judicial assessment of the punishment for such crimes, determined at the time of sentencing. There, at least, the exercise of judicial power is addressed to past facts proved in a judicial process. Such a sentence, whatever problems it raises for finality and proportionality, observes an historically conventional judicial practice. It involves the achievement of traditional sentencing objectives, including retribution, deterrence and incapacitation applied prospectively. It does not involve supplementing, at a future time, a previously final judicial sentence with new orders that, because they are given effect by the continuation of the fact of imprisonment, amount to new punishment beyond that already imposed in accordance with law.

Properly informed, the public understands the role of judges in ordering the deprivation of liberty on the basis of proved breaches of the law in the *past*. The introduction of a power to deprive persons of liberty, and to commit them to prison potentially for very long, even indefinite, periods on the basis of someone's estimate of the risk that they will offend in the *future*, inevitably undermines public confidence in the courts as places exhibiting justice to all, including those accused and previously convicted of serious crimes …

[96] *Beyond mental illness orders*: But can it be said that the orders permitted under the Act are, or are analogous to, civil commitment for mental illness? Although the predicted dangerousness of sexual offenders, based on past conduct, might not involve proof of a mental illness in the usual sense of that term, is it sufficiently analogous to allay constitutional concerns …?

Certainly, before a "continuing detention order" is made under the Act, there is no requirement for a finding as to mental illness, abnormality or infirmity in the accepted sense. In his Second Reading Speech on the Bill that became the Act [Queensland, *Parliamentary Debates*, Legislative Assembly, 3 June 2003 at 2484-6] the respondent Attorney-General made it clear that the Act was *not* founded on concepts of mental illness. This is perhaps understandable given that considerations of mental illness may lead to reducing, not increasing, criminal punishment … [T]here is no requirement for a diagnosis of mental illness, abnormality or infirmity. Nothing in the Act requires such a diagnosis, or finding by the court … The inquiry required of the court must simply focus on the *risk* of re-offending. It operates on a prediction as to *future* conduct based on estimates of propensity that would ordinarily be inadmissible in a judicial trial …

It is true that bail decisions will often be made by reference to predictive considerations. Commonly, such decisions require a court to evaluate whether an accused *will* appear to answer the charge at a trial, *will* interfere with the safety **[97]** or welfare of a victim or witness or *will* be harmed or commit self-harm. In other countries, constitutional courts have rejected the use in bail decisions of considerations of the possibility that the accused *will* commit further offences. For example, in the Irish Supreme Court, which was unanimous on the point, Walsh J observed [*People (Attorney General) v O'Callaghan* [1966] IR 501 at 516-17]:

> "In this country it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter upon which he has not been convicted or that in any circumstances he should be deprived of his liberty upon only the

> belief that he will commit offences if left at liberty, save in the most extraordinary circumstances carefully spelled out by the [Parliament] and then only to secure the preservation of public peace and order or the public safety and the preservation of the State in a time of national emergency or in some situation akin to that."

The *Bail Act* expressly provides for consideration, in bail decisions, of whether there is an unacceptable risk that, whilst released, the accused *will* commit an offence, that is, a future offence [s 16(1)(a)(ii)(A)]. It is unnecessary to decide here the constitutional validity of that provision. It is enough to point to the great difference between refusal of bail in respect of a pending charge of a *past offence* and refusal of liberty, potentially for very long intervals of time, in respect of estimations of *future* offending, based on predictions of propensity and submitted to proof otherwise than by reference to the criminal standard of proof.

In addressing legislation bearing some similarities to the Act, the Supreme Court of the United States has concluded that dangerousness by itself is insufficient to sustain civil commitment of prisoners beyond the term of punishment imposed for criminal offences. Relevantly, it is necessary for the additional finding to be made, warranting continued deprivation of liberty, that the subject is suffering from a mental illness, abnormality or infirmity that justifies the very large step of depriving him or her of liberty [521 US at 358]. The Supreme Court has held that post-sentence civil commitment must be undertaken in hospitals or equivalent institutions, segregated from prisons established for the punishment of those convicted of crime [521 US at 368-9].

The Act under consideration includes amongst its objects "care" and "treatment" of a "particular class of prisoner to facilitate their rehabilitation" [s 3(b)]. However, in the scheme of the Act, this object obviously takes a distant second place (if any place at all) to the true purpose of the legislation, which is to provide for "the continued detention in custody ... of a particular class of prisoner" [s 3(a)]. If the real objective of the Act were to facilitate rehabilitation of certain prisoners retained in prison under a "continuing detention order", significant, genuine and detailed provisions would have appeared in the Act for care, treatment and rehabilitation. There are none. Instead, the detainee remains effectively a prisoner. He or she is retained in a penal custodial institution, even as here the **[98]** very prison in which the sentences of judicial punishment have been served. After the judicial sentence has concluded, the normal incidents of punishment continue. They are precisely the same.

These features of the Act demonstrate that the orders for which it provides do not fall within the category of civil commitment for mental illness contemplated in *Lim* as an exception to the comprehensive control enjoyed by the judiciary over orders depriving persons of their liberty. Here, the deprivation can only be viewed as punishment. Although the constitutional setting in the United States is different from that operating in Australia, our legal tradition shares a common vigilance to the dangers of civil commitment that deprives persons of their liberty. In my view, the purposes of Ch III and the tests expounded by the majority in *Kable* require this Court to adopt a similar vigilance to this new mode of effective punishment provided for in the Act.

The Act is not proportional (that is, appropriate and adapted) to a legitimate non-punitive objective. It conscripts judges in the imposition of effective judicial punishment in proceedings not otherwise known to the law. The misuse of psychiatry and psychology in recent memory in other countries demands the imposition of rigorous standards before courts may be enlisted to deprive persons of liberty on psychological evidence, absent an established mental illness, abnormality or infirmity. This is why, in other countries, and hitherto in Australia, recognised and well documented mental illnesses, abnormalities or infirmities are the prerequisite for civil commitment on this ground. Psychiatric assessment of *risk* alone is insufficient. To involve the judiciary in assessments of the latter kind is to attempt to cloak such unreliable and potentially unjust guesswork with the authority of the judicial office. It is repugnant to the judicial process to do so.

Highly selective punishment: Whilst it is true that the Act does not single out, or name, an individual prisoner for continued detention (as was the case in the legislation involving Mr Kable) it is still inconsistent with the traditional judicial process. It is directed to a readily identifiable and small group of individuals who have committed the specified categories of offence and are in Queensland prisons. It adds to the effective punishment of those individuals by exposing them to continued detention beyond the sentence judicially imposed by earlier final orders. It does not contain the procedural safeguards involved in the trial before an Australian court of a criminal offence carrying the risk of punishment by imprisonment. In effect, the appellant and the small class of persons in a like position, are identified by reference both in the short title to the **[99]** Act and in its provisions …

In argument, it was suggested that, even if the Act created an effective trial and punishment of persons such as the appellant, it did no offence to the Constitution because the separation of the judicial power in the States is not as rigorous as with respect to federal courts … I doubt the correctness of this oft-stated proposition expressed so broadly; but it is unnecessary to examine that question here. By involving a State court in the imposition of punishment, without the safeguards associated with a judicial trial, the Act offends the implications of Ch III in the precise way that *Kable* described. In this country imprisonment as punishment must follow the standard of traditional judicial process and be for a conventional purpose. The Act does not observe those standards …

[101] *The dangers of phenomenological punishment*

This Court should not resolve the arguments of the parties in the present proceedings unaware of what has gone before. History evidences many patterns of unacceptable intrusions by other sources of power into the independence of the judiciary. These should not be dismissed as irrelevant to Australia. They have occurred in "highly civilised" countries, with strong legal and judicial traditions …

One pattern of intrusion into judicial functions may be observed in what occurred in Germany in the early 1930s. It was provided for in the acts of an elected government. Laws with retroactive effect were duly promulgated. Such laws adopted a phenomenological approach. Punishment was addressed to the estimated character of the criminal instead of the proved facts of a crime. Rather **[102]** than sanctioning specified criminal conduct, the phenomenological school of criminal liability procured the enactment of laws prescribing punishment for identified "criminal archetypes". These were the *Volksschädlinge* (those who harmed the nation). The attention of the courts was diverted from the *corpus delicti* of a crime to a preoccupation with the "pictorial impression" of the accused. Provision was made for punishment, or additional punishment, not for specific acts of proved conduct but for "an inclination towards criminality so deep-rooted that it precluded [the offender's] ever becoming a useful member of the ... community" [Richard Grunberger, *A Social History of the Third Reich* (Weidenfeld and Nicholson, 1971) 123].

This shift of focus in the criminal law led to a practice of not releasing prisoners at the expiry of their sentences. By 1936, in Germany, a police practice of intensive surveillance of discharged criminals was replaced by increased utilisation of laws permitting "protective custody". The German courts were not instructed, advised or otherwise influenced in individual cases. They did not need to be … Offenders for whom such punishments were prescribed were transferred from civil prisons to other institutions, such as lunatic asylums, following the termination of their criminal sentence. Political prisoners and "undesirables" became increasingly subject to indeterminate detention.

In the *Communist Party Case* [83 CLR at 187-8], Dixon J taught the need for this Court to keep its eye on history, including recent history, so far as it illustrated the over-reach of governmental power. He and his generation of Australian judges were aware of the challenge to the capacity of the judiciary to defend the rule of law. This Court should not allow the passage of fifty years since this insight to dull its memory or its appreciation of the distortions of the judicial power that are now being attempted. The principle in *Kable* was a wise and prudent one, defensive of judicial independence in Australia … I dissent from the willingness of this Court, having stated the principle, now repeatedly to lend its authority to [its] confinement … This has been done virtually to the point where the principle itself has disappeared at the very time when the need for it has greatly increased, as this case shows.